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Nos. 00-596, 00-597

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

LORILLARD TOBACCO CO., *et al.*,
*Petitioners,*

v.

THOMAS F. REILLY, Attorney General
of Massachusetts, *Respondent.*

ALTADIS U.S.A. INC., *et al.*,
*Petitioners,*

v.

THOMAS F. REILLY, Attorney General
of Massachusetts, *Respondent.*

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

## BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

DANIEL J. POPEO
RICHARD A. SAMP
(Counsel of Record)
WASHINGTON LEGAL
FOUNDATION
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

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## QUESTIONS PRESENTED

1. Whether the court of appeals erred in holding that Massachusetts regulations that sharply limit the public display of cigarette advertisements do *not* impose prohibitions "with respect to the advertising or promotion" of cigarettes within the meaning of the preemption provision of the Federal Cigarette Labeling and Advertising Act.

2. Whether Massachusetts's prohibition on virtually any public display of truthful and nonmisleading tobacco advertisements violates the First Amendment, either under the strict scrutiny standard that Petitioners contend is applicable or under the test set forth in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n,* 447 U.S. 557 (1980).

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## INTERESTS OF *AMICUS CURIAE*

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with supporters in all 50 states, including many in Massachusetts.[1] WLF regularly appears before federal and state courts promoting economic liberty, free enterprise, and a limited and accountable government.

WLF devotes a substantial portion of its resources to protecting the right of commercial free speech, appearing before this Court in cases raising commercial speech issues. *See, e.g., 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996). WLF recently successfully challenged the constitutionality of Food and Drug Administration restrictions on commercial speech. *Washington Legal Foundation v. Friedman*, 13 F. Supp. 2d 51 (D.D.C. 1998), *appeal dismissed,* 202 F.3d 331 (D.C. Cir. 2000). WLF filed *amicus curiae* briefs in this case in support of the certiorari petition and in the court of appeals.

WLF also believes strongly in the importance of preserving the policy of national uniformity embodied in the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1331, *et seq.* ("FCLAA"). That policy strongly reinforces First Amendment values and, consequently, commercial free speech rights by limiting state and local power to restrict advertising.

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[1] Pursuant to Supreme Court Rule 37.6, WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, contributed monetarily to the preparation and submission of this brief.

WLF is filing this brief with the consent of all parties. Letters of consent have been lodged with the Court.

## STATEMENT OF THE CASE

In the interests of brevity, WLF hereby incorporates by reference the Statement contained in the brief of Petitioners Lorillard Tobacco Co., *et al.* In brief, Petitioners challenge regulations (the "Regulations") promulgated by the State of Massachusetts in January 1999 that virtually eliminate the ability of manufacturers, distributors, and retailers of tobacco products to provide truthful brand and pricing information to lawful adult consumers of tobacco products by means of "outdoor" advertising. *See* 940 CMR §§ 21.00 *et seq.*, 22.00 *et seq.*[2]

The Regulations prohibit maintaining any tobacco advertisement within 1,000 feet of any school, park, or playground. 940 CMR §§ 21.04(5)(a), 22.06(5)(a). The prohibited zone covers between 87% and 91% of the land area in the cities of Boston, Worcester, and Springfield. Petition Appendix in No. 00-596 ("Pet. App.") 79a. The district court determined that the zone "effectively bans nearly all outdoor advertising, and captures nearly all retail establishments in those cities." *Id.* The Regulations apply to *all* outdoor tobacco advertising, without regard to the truthfulness of the advertisement or whether it actually misleads any consumers. The Regulations also impose strict limits on retail sales practices of those selling tobacco products. 940 CMR §§ 21.04(1) and (2), 22.06(1) and (2).

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[2] The definition of "outdoor" advertising includes advertising inside a store that is visible from the outside.

The Regulations also require that specified health warnings be prominently displayed on all cigar advertisements and package labeling. 940 CMR §§ 22.04 and 22.05.

Petitioners filed suit in May 1999 in U.S. District Court for the District of Massachusetts, challenging the Regulations on three principal grounds. First, Petitioners in No. 00-596 (manufacturers of cigarettes and smokeless tobacco) argued that the Regulations were preempted by the FCLAA, which imposes strict limits on state regulation of cigarette advertising. Second, all Petitioners argued that the Regulations violated the First Amendment right to engage in truthful commercial speech. Third, Petitioners in No. 00-597 (cigar manufacturers) alleged that the Regulations violated the Commerce Clause because the health warning requirements imposed an undue burden on interstate commerce.

On December 2, 1999, the district court held that the Regulations were in large measure *not* preempted by the FCLAA. Pet App. 46a-60a. The court held that the Regulations focused principally on the *location* of tobacco advertisements, and that the FCLAA's preemption provision applies only to state and local laws that seek to regulate the *content* of such ads. *Id.* at 55a-56a. While conceding that the preemption provision of the FCLAA could be interpreted as applying to the Regulations if one's analysis focused on the FCLAA's language (*id.* at 53a), the court rejected that interpretation because it would "leav[e] states essentially powerless" to exercise their "inherent police powers to regulate smoking" -- powers that (the court believed) Congress intended to protect. *Id.* at 54a-55a.

The district court also upheld provisions in the Regulations that outlaw (in the absence of age verification) certain tobacco product promotional techniques, including sampling, promotional give-aways, and offering gifts to tobacco purchasers. The court held that those provisions were not preempted by the FCLAA because they addressed the illegality of underage smoking, not the relationship between smoking and health. *Id.* at 58a-59a.[3]

On January 24, 2000, the district court rejected Petitioners' First Amendment challenge to the Regulations, granting summary judgment to Massachusetts. Pet. App. 61a-104a. Initially, the court rejected Petitioners' argument that the Regulations should be subject to a heightened standard of review, higher than the standard of review for commercial speech set forth in *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n,* 447 U.S. 557 (1980). *Id.* at 65a-68a. The court held that the Regulations survived the *Central Hudson* test because they directly advanced a substantial government interest (reducing youth smoking) in a manner no more extensive than necessary. *Id.* at 68a-87a. The court held that Massachusetts's evidence was sufficient to establish as a matter of law that "it was reasonable" for the

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[3] The court held that the FCLAA did preempt a provision of the Regulations that permitted "tombstone advertising" -- small signs placed outside retail establishments stating "Tobacco Products Sold Here." 940 CMR § 21.04(6). Pet. App. 57a. The court went on to hold that § 21.04(6) was severable from the remainder of the Regulations and thus that the remaining provisions were fully enforceable. *Id.* The effect of this ruling was to render the Regulations more restrictive of commercial speech than as originally promulgated. Massachusetts did not appeal from this aspect of the district court's ruling.

Attorney General to conclude that the goal of reducing youth smoking "would be advanced in some material respect" by restricting tobacco advertising. *Id.* at 74a. The court also held as a matter of law that virtually all of the restrictions on advertising were sufficiently narrowly tailored to pass constitutional muster "[i]n light of the marginal success" of all the state's non-speech-related efforts to control youth smoking. *Id.* at 78a.[4]

The district court also held that the cigar health warning requirements did not violate the First Amendment. *Id.* at 89a-93a. Recognizing that the warning requirements, if broadly construed, might present Commerce Clause difficulties, the court construed the requirements as not applying to Internet advertising and advertising in national magazines, and as permitting warning labels to be affixed at any time prior to retail sale. *Id.* at 100a-103a. As so construed, the court rejected the Commerce Clause challenge. *Id.* at 93a-103a.

On July 17, 2000, the First Circuit affirmed in substantial part. Pet. App. 1a-45a. With respect to FCLAA preemption, the appeals court said that the Regulations involved legislation in a field "traditionally occupied" by the States and thus that it would invoke a strong "presumption against preemption." *Id.* at 7a-9a. In interpreting the FCLAA language it viewed as key -- the preemption of State

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[4] The court struck down one provision on First Amendment grounds: 940 CMR § 21.04(5)(b), which prohibited indoor, point-of-sale tobacco advertising less than five feet from the floor. The court held that Massachusetts failed to demonstrate that this provision was not more extensive than necessary to serve the state's interest in reducing youth smoking. *Id.* at 82a.

laws "with respect to the advertising or promotion of any cigarettes" (15 U.S.C. § 1334(b)) -- the Court said that the language should not be given a "hyper-literal reading," because otherwise the FCLAA would preempt a broad range of State regulation "which Congress surely did not intend to affect." *Id.* at 10a.

Rather, the court deduced the meaning of § 1334(b) by turning to the FCLAA's statement of purpose, 15 U.S.C. § 1331. The court noted two purposes listed in § 1331: (1) to inform the public of the health risks associated with smoking; and (2) to protect the national economy from the burdens that would result from a multitude of "diverse, nonuniform, and confusing" advertising standards. *Id.* The court determined that the Regulations offended neither of those purposes and thus were not preempted. It held that the Regulations were merely "location" restrictions, not an effort to regulate the content of any tobacco advertising. *Id.* at 12a-13a. It held that to the extent that the Regulations contributed to the nonuniformity of tobacco advertising restrictions nationwide, "such divergent restrictions are indistinguishable from the existing zoning regulations in place throughout the country." *Id.* at 13a.

With respect to the First Amendment claims, the First Circuit rejected Petitioners' argument that -- in light of the near-total prohibition on truthful tobacco advertising based solely on its content[5] -- heightened review (*i.e.*, review beyond that required by *Central Hudson*) was in order. *Id.*

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[5] The appeals court rejected out of hand Massachusetts's suggestion that the Regulations did not amount to content-based speech restriction. *Id.* at 14a.

at 14a-16a. The court cited *Greater New Orleans Broadcasting Ass'n v. United States*, 527 U.S. 173 (1999), for the proposition that heightened review is inappropriate even when regulations single out the promotional speech of a particular industry. *Id.* at 15a. The court acknowledged "rumblings from members of the Supreme Court and others suggesting that the *Central Hudson* test may be in need of minor or major modification"; but it felt "bound to apply the *Central Hudson* test, as is, to this case," because it was not the court's role "to anticipate changes in well-established constitutional doctrines." *Id.* at 16a.

The court then determined that the Regulations passed muster under the *Central Hudson* test. Pet. App. 17a-35a. Because the court was reviewing the grant of summary judgment for Massachusetts, it assumed that the speech at issue was truthful, nonmisleading speech about a lawful activity. The court determined that Massachusetts had a substantial interest in preventing children from smoking (*id.* at 18a), that the Regulations "directly advance" that interest by reducing underage smoking to a material degree (*id.* at 19a-29a), and that the Regulations do not restrict more speech than is necessary to achieve the State's purpose. *Id.* at 29a-35a.[6]

The appeals court also rejected the cigar manufacturers' First Amendment challenge to the cigar health warning

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[6] The court reversed the district court's sole First Amendment ruling in support of Petitioners -- the district court's decision to strike down the prohibition against indoor, point-of-sale tobacco advertising less than five feet from the floor. *See* Note 4, *supra*. In upholding the prohibition, the appeals court stated that its earlier *Central Hudson* analysis was equally applicable and that "the fit between ends and means" was "very reasonable." *Id.* at 35a-37a.

requirements, "for substantially the reasons set forth in the lower court's opinion." *Id.* at 38a-40a. However, the court agreed in large measure with the cigar manufacturers' Commerce Clause claims. *Id.* at 40a-44a. The court held that the health warning required on advertising unduly burdened interstate commerce because the practical effect of the requirement was to compel manufacturers to include the Massachusetts warnings in all national advertising. *Id.* at 40a-43a. The court held that the warning required on package labeling also unduly burdened interstate commerce because manufacturers would be required to include Massachusetts labels on all their products -- no matter where sold -- in order to avoid the liability that would be imposed if a cigar lacking the required labeling were imported into Massachusetts by a third party. *Id.* at 43a-44a.

Massachusetts did not cross-petition on the Commerce Clause findings. Accordingly, the case is before the Court solely on the First Amendment and FCLAA issues.

## SUMMARY OF ARGUMENT

The First Circuit's decision that the Regulations are not preempted by federal law is inconsistent with the better-reasoned decisions that have addressed the preemptive effect of the FCLAA. *See, e.g., Lindsey v. Tacoma-Pierce County Health Dept.*, 195 F.3d 1065 (9th Cir. 1999). In preempting any state or local "requirement or prohibition based on smoking and health . . . with respect to [cigarette] advertising or promotion" (15 U.S.C. § 1334(b)), Congress was concerned with the impact of state and local regulations on "commerce and the national economy." 15 U.S.C. § 1331. Section 1334(b) bars *all* positive enactments of state

or local bodies that specifically target cigarette advertising for adverse treatment. To allow each of the 50 states and each of the thousands of municipalities throughout the country to decide where, in what media, and under what conditions cigarette advertising may be allowed -- each in the name of serving some assertedly nonpreempted purpose -- would make a mockery of the policy of national uniformity embodied in the FCLAA, and would defeat the "comprehensive Federal program" that policy serves.

Quite apart from the preemption issue, the Regulations are also deficient under established case law governing restrictions on commercial speech. Moreover, that case law is in need of substantial modification. WLF respectfully suggests that the Court modify the *Central Hudson* test, to clarify that blanket bans on truthful, nonmisleading commercial speech are subject to strict First Amendment scrutiny. Such strict scrutiny would be applied whenever, as here, the purposes underlying the more-relaxed standard of review often applied to commercial speech (principally, a desire to preserve a fair bargaining process by ensuring that consumers are not misled by inflated sales pitches, *44 Liquormart,* 517 U.S. at 501 (plurality opinion)) are not implicated by the regulation in question.

## ARGUMENT

### I. THE REGULATIONS IMPOSE A "PROHIBITION" THAT IS "WITH RESPECT TO THE ADVERTISING OR PROMOTION" OF CIGARETTES, AND THEY THUS ARE PREEMPTED

## A. By Its Plain Language, the FCLAA Preempts State Regulation of Cigarette Advertising

In the FCLAA, Congress sought to ensure that the public would be "adequately informed" about the health risks associated with smoking by requiring every cigarette package (and, later, by requiring every cigarette advertisement) to carry health warnings specified by Congress itself. At the same time, Congress also sought to "protect commerce and the national economy" to "the maximum extent consistent with [that] declared policy" by preserving the cigarette manufacturers' ability to advertise their products free from "diverse, nonuniform, and confusing" state and local regulations based on smoking and health. 15 U.S.C. § 1331.[7]

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[7] Section 1331, which declares the policy and purpose of the FCLAA, provides in its current form:

> It is the policy of the Congress, and the purpose of this chapter, to establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, whereby--
>
> > (1) the public may be adequately informed about any adverse health effects of cigarette smoking by inclusion of warning notices on each package of cigarettes and in each advertisement of cigarettes; and
> >
> > (2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, nonuniform and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.

(continued...)

To give effect to this policy of national uniformity -- protecting cigarette advertising while providing for the dissemination of government warnings about smoking -- the FCLAA contains an explicit preemption provision that provides:

> No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.

15 U.S.C. §1334(b). This provision "[p]rohibits health-related regulation or prohibition of cigarette advertising by any State or local authority." S. Rep. No. 91-566, at 1 (1969). Congress thus sought to protect "commerce and the national economy" from "the chaos created by a multiplicity of conflicting regulations." *Id.* at 12.

A majority of the Justices in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), and the Ninth Circuit in *Lindsey*, recognized that the language of § 1334(b) is expansive. Thus, even giving that language a "narrow" reading (505 U.S. at 518), the *Cipollone* plurality emphasized that the key phrase "'[n]o requirement or prohibition' sweeps broadly." *Id.* at 521; *see also id.* at 551 (Scalia, J., concurring in the judgment in part and dissenting in part). The Ninth Circuit in *Lindsey* likewise emphasized the expansiveness of § 1334(b), and the court noted that *Cipollone* had rejected giving that provision a more

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[7](...continued)
15 U.S.C. § 1331.

restrictive meaning than the "plain meaning" of the words actually used. *Lindsey*, 195 F.3d at 1071-73 (citing *Cipollone*, 505 U.S. at 522 (plurality); and *id.* at 548 (Scalia, J., concurring in the judgment in part and dissenting in part)).

The First Circuit appeared to recognize § 1334(b)'s broadly worded nature, but it nonetheless declined to follow the Ninth Circuit's lead in assigning the words of § 1334(b) their natural meaning. Rather, the First Circuit accused the *Lindsey* court of "fail[ing] to avoid the 'uncritical literalism' that the Supreme Court has cautioned us against." Pet. App. 13a n.7 (quoting *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins.*, 514 U.S. 645, 656 (1995)). It explicitly disagreed with the Ninth Circuit's conclusion that "'[t]here is no good reason to believe that Congress meant less than what it said,' *Lindsey*, 195 F.3d at 1073, in the phrase 'with respect to advertising.'" Pet. App. 13a n.7. The appeals court referred to the "ambiguity" of § 1334(b)'s phrase "with respect to" advertising and promotion, and asserted:

> [A] "hyper-literal" reading of that phrase would preempt a range of state regulation which Congress surely did not intend to affect. [*Greater New York Metropolitan Food Council v. Giuliani*, 195 F.3d 100, 105 (2d Cir. 1999), *cert. denied,* 120 S. Ct. 1671 (2000).] For example, "it could divest states and municipalities of authority to prevent tobacco advertisers from posting their ads in public buildings even though smoking is legally prohibited there. Or, . . . it could lead to the conclusion that states [are] without

> power to prohibit a cigarette company from handing out free cigarettes in an elementary school yard." *Id.*

Pet. App. 10a.

Accordingly, the First Circuit simply refused to base its decision on an analysis of § 1334(b)'s language. Rather, it focused on the FCLAA's statement of purpose at 15 U.S.C. § 1331. It held that the Regulations did not conflict with Congress's purpose (which, according to the court, consisted of a desire to prevent conflicting regulations regarding the "information" contained in cigarette advertising, *id.*) and thus that the Regulations are not "with respect to" advertising and are not preempted. *Id.* at 10a-13a.[8]

This Court has never endorsed such a counter-textual method of statutory interpretation. "Pre-emption fundamentally is a question of congressional intent." *English v. General Electric Co.*, 496 U.S. 72, 78-79 (1990). That intent is to be derived, wherever possible, by examining the words actually chosen by Congress, not (as did the First Circuit) by

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[8] The First Circuit did not directly address whether the Regulations constituted a prohibition "based on smoking and health." The court's very abbreviated discussion of that issue suggests that the Court believed that the Regulations *were* "based on smoking and health," because the court said that it "d[id] not adopt" the Fourth Circuit's contrary conclusion in *Penn Advertising, Inc. v. Mayor and City Council*, 63 F.3d 1318 (4th Cir. 1995), *vacated and remanded*, 518 U.S. 1030 (1996), *adopted as modified*, 101 F.3d 332 (4th Cir. 1996), *cert. denied*, 520 U.S. 1204 (1997). Pet. App. 13a n.6. Because § 1334(b)'s "based on smoking and health" language played no part in the First Circuit's decision upholding the regulations, the meaning of that phrase is not now before the Court. Accordingly, this brief does not address the meaning of that phrase.

rejecting the most natural reading of the statutory language simply because one cannot believe that Congress would have intended all of the consequences that would flow from adopting a natural reading. *Hughes Aircraft Co. v. Jacobson,* 119 S. Ct. 755, 760 (1999); *Medtronic, Inc. v. Lohr,* 518 U.S. 470, 486 (1996) ("Congress's intent, of course, is discerned from the language of the pre-emption statute and the statutory framework surrounding it.") (citation omitted).

Any faithful reading of § 1334(b)'s language requires a conclusion that the Regulations are preempted. Section 1334(b) bars any state or local "prohibition" "with respect to the advertising or promotion" of cigarettes. There can be no serious dispute that the Regulations impose a "prohibition." Nor can Massachusetts seriously assert that the Regulations are not "with respect to the advertising or promotion" of cigarettes, as those words are commonly understood; indeed, 940 CMR 21.04(5) is entitled, "Advertising Restrictions."

The First Circuit admitted as much but nonetheless held that § 1334(b) was intended to bar only *some* prohibitions "with respect to the advertising or promotion" of cigarettes: those that sought to regulate the *content* of cigarette advertising but not those that sought to regulate the *location* of such advertising. Pet. App. 10a-11a. Nothing in the language of § 1334(b) supports such a distinction between prohibitions based on "content" and on "location" -- even conceding for the sake of argument that the Regulations can accurately be categorized as "location"- based. Nor does § 1331 (the FCLAA's statement of purpose) support the distinction that the First Circuit attempted to draw. The appeals court is correct that Congress in § 1331 made clear its desire to protect "commerce and the national economy"

by prohibiting "nonuniform and confusing cigarette labeling and advertising regulations," but that language does not support the court's conclusion. If large numbers of localities began imposing bans on outdoor cigarette advertising, the diversity, nonuniformity, and confusion in the field of cigarette advertising regulation would be just as great as if large numbers of localities began mandating specific content in cigarette advertising. In both instances, nationwide product promotional campaigns would have to be varied from city to city (and from section to section within cities) to meet the vagaries of local law. Section 1331(2) addresses the problems of nonuniformity created by diverse "advertising regulations," not merely those created by diverse "warning" requirements.

Moreover, there is no merit to the First Circuit's assertion that interpreting the words of § 1334(b) in accord with their plain meaning would lead to an array of untenable results that Congress could not have intended. For example, the court asserted that Congress could not possibly have intended to "divest states and municipalities of authority to prevent tobacco advertisers from posting their ads in public buildings even though smoking is legally prohibited there." Pet. App. 10a. But § 1334(b) quite plainly does *not* prevent states and municipalities from prohibiting tobacco advertising in public buildings; § 1334(b) bars them from doing so only if the prohibition is "based on smoking and health." A municipal ban on *all* advertisements in a public building that is not a public forum would not be "based on smoking and health" and thus would not be preempted. A ban that targeted only tobacco advertisements would, of course, be prohibited, but there is no reason to believe that Congress

did not mean to prohibit such content-based speech restrictions.[9]

The appeals court also worried that a "hyper-literal" reading of § 1334(b) would lead to the conclusion that Congress intended to deny States the power to prohibit a cigarette company from handing out free cigarettes in an elementary school yard. *Id.* Such concerns are wholly fanciful. Nothing in the language of § 1334(b) suggests that Congress intended to interfere with State regulation of the manner in which cigarettes are distributed; indeed, States are free to ban the sale and distribution of tobacco products altogether. None of the courts that have invoked § 1334(b) to strike down cigarette advertising bans has suggested that the prohibition on sale or distribution to minors (currently in place in all 50 States) is preempted. What States may *not* do under § 1334(b) is to burden truthful cigarette advertising by imposing a requirement or prohibition "based on smoking and health."

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[9] The appeals court's language suggests that the First Circuit believed that an advertising ban directed only at tobacco advertisements was rendered wholly unobjectionable if the ban applied only in buildings in which smoking was illegal. That suggestion makes no sense. There undoubtedly are many buildings in Massachusetts in which smoking is prohibited, but the sale and use of tobacco products remains a legal activity within the State. Unless Massachusetts is prepared to argue that a cigarette advertisement in a smoke-free office building is highly likely to induce those within the building to defy the smoking ban, there is nothing incongruous about insisting that tobacco advertising be placed on an equal footing with other advertising within a smoke-free building.

In sum, the plain language of § 1334(b) leaves little doubt that Congress intended to prevent States and municipalities from enacting the sort of tobacco advertising ban at issue in this case. By operation of the Supremacy Clause, the Regulations are invalid.

### B. In Choosing to Ignore the Plain Meaning of § 1334(b), the First Circuit Adopted Invalid Statutory Construction Rules

To justify its decision to stray from the plain meaning of § 1334(b), the First Circuit cited repeatedly to the presumption against preemption. *See, e.g.*, Pet. App. 12a ("We therefore must read the language of the FCLAA . . . in light of the manifest congressional concern in preserving for the states the remainder of their traditional police power.") (quoting *Federation of Advertising Industry Representatives, Inc.* [*"FAIR"*] *v. City of Chicago,* 189 F.3d 633 (7th Cir. 1999), *cert. denied,* 120 S. Ct. 1671 (2000)).

But this Court has never viewed the presumption against preemption as anything other than one statutory tool among many, to be used in attempting to discern congressional intent. Where (as here) congressional intent can be discerned from the plain meaning of the statutory language, courts are not warranted in resorting to a presumption against preemption as a justification for departing from that plain meaning. *Hughes Aircraft,* 119 S. Ct. at 755. By invoking a presumption against preemption as the decisive factor in finding that the Regulations are not preempted, the First Circuit abandoned the search for Congress's purpose, substituting instead a bias in favor of preserving state law regardless of congressional intent.

Invocation of a presumption against preemption is particularly inappropriate on this record. As the Court explained just this week, a presumption against federal preemption of State regulation may be warranted when the regulation takes place in "'a field which the States have traditionally occupied.'" *Buckman Co. v. Plaintiffs' Legal Committee,* No. 98-1768 (U.S. Sup. Ct., Feb. 21, 2001), slip op. at 5. But Massachusetts does not contend that it has ever previously attempted to impose special restrictions on tobacco advertising, or to impose restrictions on *any* outdoor advertising based on the subject matter. Indeed, local restrictions on tobacco advertising were not attempted outside Utah until very recently. Because there were virtually no state-law tobacco advertising restrictions in place when the FCLAA was adopted in 1969, there is no reason to presume that Congress intended that its law not displace such restrictions. *See also, United States v. Locke,* 120 S. Ct. 1135, 1147 (2000).

Nor can the First Circuit's rejection of § 1334(b)'s plain meaning be justified by the court's citation to *Travelers.*[10]

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[10] The First Circuit did not simply ignore the actual language of the FCLAA; it appeared to conclude that since the plain meaning of the statute led to what the court viewed as unpalatable results, the statutory language *should be* ignored. The court could not claim support for this dubious approach in *Cipollone*, which had said quite the opposite. It turned instead to *Travelers*, a Supreme Court ERISA case in which the Court deemed it necessary to "go beyond the unhelpful text" of ERISA's extraordinarily expansive preemption provision, by "look[ing] instead to the objectives of the ERISA statute as a guide." *Travelers*, 514 U.S. at 655-56. A fair reading of *Travelers* -- read on its own or (more appropriately) with the far more apposite holding in *Cipollone* in mind -- does not begin to support the

(continued...)

The court cited *Travelers* for the proposition that federal preemption statutes should not be read with "uncritical literalism" lest the result would be "to read the presumption of preemption out of the law." Pet. App. 11a-12a (quoting *FAIR*, 189 F.3d at 637). When understood in its context as an ERISA preemption case, *Travelers* provides no support for the First Circuit's analysis.

At the outset, the language of ERISA lends little support for *any* interpretation of the FCLAA. The language of ERISA's preemption statute (which preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan [covered by ERISA]")[11] is far more vague and open-ended than the language of § 1334(b). It is for this reason that the Court has described ERISA's text as "unhelpful" while concluding that the "plain meaning" of the FCLAA should serve as the guide to its meaning. *Compare Travelers*, 514 U.S. at 656 (ERISA text discussed) with *Cipollone*, 505 U.S. at 517 (FCLAA text described).

The First Circuit's selective reading of ERISA case law is, in any event, fundamentally misguided. Even if, as the appeals court suggested, a few words of the limiting language of the FCLAA at issue here ("with respect to advertising and promotion") are similar in breadth to ERISA's preemption provision ("relate to any employee benefit plan"), ERISA case law itself leads to the conclusion that the Regulations should have been held entirely preempted.

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[10](...continued)
First Circuit's analysis.

[11] 29 U.S.C. § 1144(a).

Specifically, the First Circuit's selective quotation of *Travelers* fails to inform the reader that this Court has construed ERISA's "relate to" language as yielding two alternative approaches, only one of which was at issue in *Travelers*. As the Court subsequently noted in *California Division of Labor Standards Enforcement v. Dillingham Construction, N.A., Inc.*, 519 U.S. 316 (1997), "[a] law relates to a covered employee benefit plan for purposes of [ERISA] preemption if it (1) has a connection with *or (2) reference to such a plan.*" *Id.* at 324 (internal quotations omitted) (emphasis added). The Court made clear in that case that its decision in *Travelers* -- which relied upon "'the objectives of the ERISA statute'" so as to avoid an "uncritical literalism" -- addressed only the first-prong "connection with" approach. *Dillingham,* 519 U.S. at 325 (citation omitted).

The approach not addressed in *Travelers* -- namely, the "reference to" approach -- is that which heeds the assumption, recognized in *Cipollone* and other decisions of this Court, that "the ordinary meaning" of a preemption provision "accurately expresses the legislative purpose" of Congress. *See Cipollone,* 505 U.S. at 532 (Blackmun, J., concurring in part and dissenting in part) (citation omitted); *see also id.* at 521-22 (plurality opinion) (citation omitted); *id.* at 545 (Scalia, J., concurring in part and dissenting in part). According to this approach, a state law "refers to" an ERISA plan (and is therefore preempted) if it "acts immediately and exclusively upon ERISA plans" or "the existence of ERISA plans is essential to the law's operation." *See Dillingham*, 519 U.S. at 325.

That is precisely the case here. That the Regulations make *reference to* cigarette advertising or promotion is obvious. That is what they are all about. As the First Circuit itself acknowledged, the Regulations are intended to "restrict the sale, promotion, and labeling of tobacco products." Pet. App. 4a. Thus, even under the operative test for ERISA preemption set forth in *Dillingham,* the Regulations clearly "refer to" cigarette advertising and therefore "relate to" it as well.

Finally, the First Circuit's ruling that § 1334 permits States to regulate the advertising or promotion of cigarettes based on smoking and health concerns under the guise of "zoning regulations" so long as those restrictions do not affect the content of federally mandated health warnings (Pet. App. 12a-13a), is simply untenable. There is no "zoning regulations" exception to § 1334(b)'s preemption provision. State and local zoning regulations that are "based on smoking and health" *and* imposed "with respect to the advertising or promotion of cigarettes" are -- like the Regulations -- expressly preempted by the FCLAA.

## II. THE REGULATIONS VIOLATE THE FIRST AMENDMENT BY IMPERMISSIBLY RESTRICTING NONMISLEADING COMMERCIAL SPEECH

### A. The *Central Hudson* Test Provides Insufficient Protection to Commercial Speech and Should Be Abandoned

The FCLAA does not purport to preempt State and municipal regulation of cigar advertising and promotion. Accordingly, the Court will need to address the First

Amendment issues raised by this case regardless whether the Court's FCLAA's analysis obviates the need to address the First Amendment claims raised by the cigarette and smokeless tobacco manufacturers in No. 00-596.

WLF concurs with Petitioners that the Regulations violate the First Amendment even if they are examined under the standard of review set forth in *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980). WLF is writing separately on this issue to encourage the Court to abandon the current *Central Hudson* test once and for all. The Court has been moving in that direction for the past decade in its commercial speech decisions. Because it involves restrictions on wholly truthful speech -- a category of speech for which extremely few restrictions are warranted, regardless whether the speech is commercial or noncommercial -- this case provides a particularly appropriate occasion to provide *Central Hudson* with the overhaul it desperately requires.

The short-comings of the *Central Hudson* test could not be more starkly illustrated than they are in this case. Applying that test in an apparently good-faith manner, the First Circuit upheld a virtually total ban on outdoor tobacco advertising in the Commonwealth of Massachusetts. The ban was upheld even though: (1) the speech at issue was wholly truthful and non-misleading and concerned a lawful product; (2) there was no evidence that the speech was directed at minors; (3) the court of appeals conceded that the ban was content-based -- the *only* type of speech prohibited is speech that promotes the use or sale of tobacco products; (4) the evidence was equivocal at best regarding whether the Regulations would reduce underage smoking to a material

degree; and (5) other methods that do not involve restricting speech could be used to achieve the State's purpose.

Any First Amendment test that could even arguably be applied to uphold sweeping speech restrictions of the type at issue in this case has little to recommend itself. The Court has repeatedly recognized that commercial speech -- while standing somewhat lower in the First Amendment pantheon than does political speech -- is still entitled to substantial constitutional protection. But the *Central Hudson* test as applied here provides virtually no First Amendment protection; as construed by the First Circuit, *Central Hudson* has become an elastic concept that requires judicial deference to virtually any government commercial speech restriction imposed under the banner of children's welfare.

The importance of advertising in our free-market economy cannot easily be overstated. As the Court has recognized, commercial messages have played "a central role in public life" in this country since colonial times. *44 Liquormart, Inc. v. Rhode Island,* 517 U.S. 484, 495 (1996) (plurality opinion). In recognition of that role, the courts have held that "the First Amendment protect[s] the dissemination of truthful and nonmisleading commercial messages about lawful products and services." *Id.*

Nonetheless, governments generally have been afforded somewhat more leeway in regulating commercial speech than other forms of speech. That greater leeway has been justified in large part by states' strong interest in protecting consumers from false or misleading information that could result in fraudulent transactions. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748,

771-772 & n.24 (1976). States also have an interest in restricting "some forms of aggressive sales practices that have the potential to exert 'undue influence' over consumers." *44 Liquormart,* 517 U.S. at 498 (plurality) (citing *Bates v. State Bar of Arizona,* 433 U.S. 350, 366 (1977)).

But where, as here, the commercial speech at issue is neither false nor inherently misleading, nor proposes an illegal transaction, the Court has been extremely reluctant to permit speech restrictions that amount to a ban on wide-ranging categories of commercial speech. As the Court recently observed, "[W]hen a State entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process, there is far less reason to depart from the rigorous review that the First Amendment generally demands." *44 Liquormart,* 517 U.S. at 501 (plurality). Such "complete speech bans" are "particularly dangerous" because "they all but foreclose alternative means of disseminating certain information." *Id.* The Court went so far as to state categorically in one recent case that "*only* false, deceptive or misleading commercial speech may be banned." *Ibanez v. Florida Dep't of Bus. and Prof'l Regulation,* 512 U.S. 136, 142 (1994) (emphasis added).

The Regulations do not, of course, *completely* ban all cigarette advertising within Massachusetts. A Boston store wishing to inform the public that it sells a particular brand of cigarettes is still free to post a sign to that effect somewhere in the 9% of the city in which cigarette advertising is permitted, or to take out a newspaper advertisement. But such advertising is not a realistic alternative for many store owners; a sign posted miles from the store is unlikely to be

read by the store's potential customers, and the prohibitive cost of newspaper advertisements places such advertising out of reach of most individual merchants. The Court has stated repeatedly that commercial speech restrictions will be subjected to heightened scrutiny even when they do not completely prohibit dissemination of truthful information about a lawful product, if those restrictions fail to leave open satisfactory alternative channels of communications. *See, e.g., 44 Liquormart,* 517 U.S. at 501-02 (plurality) (Rhode Island law prohibiting truthful advertising of liquor prices subjected to heightened scrutiny, even though merchants permitted to display in-store signs listing prices); *Linmark Associates, Inc. v. Willingboro,* 431 U.S. 85, 92-94 (1977) (ban on "For Sale" signs in front of residential housing failed to provide satisfactory alternative means of informing the public that a particular house was for sale, because "For Sale" signs were the principal means by which such information was traditionally conveyed).

As the Court has made clear, government bans on commercial speech are anathema to the First Amendment when designed not to guard consumers from false or misleading information, but rather as an indirect means of regulating conduct. Such bans are premised on the assumption that the government knows best what is good for consumers and that they are better off if they are denied access to certain information, even though it is not in any way misleading. The Court has labeled such assumptions "offensive" to First Amendment values:

> Precisely because bans against truthful, nonmisleading commercial speech rarely seek to protect consumers from either deception or overreaching, they usually rest

> solely on the offensive assumption that the public will respond "irrationally" to the truth. *Linmark,* 431 U.S., at 96. The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the public perceives to be their own good. That teaching applies equally to state attempts to deprive consumers of accurate information about their chosen products.

*44 Liquormart,* 517 U.S. at 503 (plurality); *see also id.* at 517 (Scalia, J., concurring in part); *id.* at 526-27 (Thomas, J., concurring in part); *Virginia State Board of Pharmacy,* 425 U.S. at 762 ("the general rule is that the speaker and the audience, not the government, assess the value of the information presented.").

The Regulations could not survive the strict First Amendment review that the Court's recent opinions suggest is required of all laws that impose total or near-total bans on non-misleading commercial speech. The result of the Regulations is to deprive consumers of significant amounts of truthful information. Massachusetts insists, of course, that its purpose is to keep this information away from *minors*, who are prohibited by law from purchasing cigarettes. But the Court has rejected broad commercial speech bans even when their ostensible purpose was to protect children from the speech, noting that under the First Amendment the "government may not reduce the adult population . . . to reading only what is fit for children." *Bolger v. Youngs Drug Prods. Corp.,* 463 U.S. 60, 73-74 (1983).

The First Circuit nonetheless rejected Petitioners' First Amendment challenge to the regulations, invoking the *Central Hudson* test. That result suggests the existence of considerably tension between *Central Hudson* and more recent decisions of the Court. Indeed, that tension was acknowledged in *Greater New Orleans Broadcasting,* 527 U.S. at 184, and by several of the opinions in *44 Liquormart. See, e.g., 44 Liquormart,* 517 U.S. at 526-28 (Thomas, J., concurring in part). WLF respectfully suggests that this case provides an appropriate vehicle for jettisoning the *Central Hudson* test in order to remove that tension.

The essential shortcoming of *Central Hudson* is that it really is no test at all. It permits content-based government regulation of commercial speech where the government has a substantial interest that is directly served by the regulation and where the regulation is no more extensive than necessary to achieve the substantial interest. As applied to speech which the government wishes to keep away from children, *Central Hudson* can be construed (as did the First Circuit) as imposing no constitutional limits whatsoever. Under the First Circuit's view, *any* amount of speech about activities inappropriate for children could induce some amount of that activity among children. Because it is virtually impossible to ensure that *no* children will be exposed to such speech, the effect of the First Circuit's interpretation of *Central Hudson* is to eliminate *all* First Amendment controls over even blanket bans on truthful speech about adult-only activities. Indeed, that is precisely the situation here; despite Massachusetts's insistence that the Regulations are (in some unfathomable way) "carefully tailored" in a manner designed to protect children, the Regulations effectively ban all outdoor advertising of tobacco products.

### B. *Central Hudson* Should Only Be Applied in Cases Involving Misleading or Potentially Misleading Commercial Speech

WLF respectfully suggests that the Court modify the *Central Hudson* test, to clarify that blanket bans on truthful, nonmisleading commercial speech are subject to strict First Amendment scrutiny. Such strict scrutiny would be applied whenever, as here, the purposes underlying the more-relaxed standard of review often applied to commercial speech (principally, a desire to preserve a fair bargaining process by ensuring that consumers are not misled by inflated sales pitches, *44 Liquormart,* 517 U.S. at 501 (plurality opinion)) are not implicated by the regulation in question.

WLF does not suggest that all constitutional distinctions between commercial and noncommercial speech be eliminated. But previously articulated bases for those distinctions need to be re-examined. The Court traditionally has justified a somewhat lower degree of constitutional protection for commercial speech by citing two alleged "common sense" differences between commercial and noncommercial speech:

> The truth of commercial speech . . . may be more easily verifiable by its disseminator than, let us say, news reporting or political commentary, in that ordinarily the advertiser seeks to disseminate information about a specific product or service that he himself provides and presumably knows more about than anyone else. Also, commercial speech may be more durable than other kinds. Since advertising is the *sine qua non* of commercial profits, there is little

likelihood of its being chilled by proper regulation and foregone entirely.

*Virginia State Bd. of. Pharmacy,* 425 U.S. at 771 n.24.

WLF respectfully submits that, regardless of what "common sense" once seemed to suggest, these distinctions can no longer, under careful consideration, support sharply different constitutional treatment for commercial and noncommercial speech. The claim that commercial speech is "more durable" than other forms of speech because it is engaged in for a profit has never been borne out by research. Other motivations for speaking can be just as strong as economics, such as religious feeling, political enthusiasm, or artistic impulses. *See* Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech,* 76 Va. L. Rev. 627, 637 (1990).[12] Nor does verifiability adequately distinguish between commercial and noncommercial speech. Many varieties of noncommercial speech, such as scientific speech, are at least as objective as commercial speech yet receive full First Amendment protection. *Id.* at 635.

Perhaps the only difference between commercial and noncommercial speech of any real constitutional significance is that commercial speech is far more likely to be relied on by recipients in connection with major life decisions. Because of the relative importance of commercial speech in

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[12] Moreover, economic motivation does not adequately distinguish commercial from noncommercial speech. Much noncommercial speech is engaged in for a profit but nonetheless receives full First Amendment protection, such as newspaper publishing and news broadcasting. *Id.*

the day-to-day lives of listeners, the government has a particular interest in ensuring that commercial speech not be misleading. As the Court has recognized, "The First Amendment . . . does not prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely." *Virginia State Bd. of Pharmacy,* 425 U.S. at 771-72. Accordingly, the government has a heightened interest in ensuring that commercial speech not be misleading or potentially misleading. That interest is sufficient to justify continuation of the *Central Hudson* test in cases in which the truthfulness of the speech is subject to challenge.[13]

But where, as here, there is no evidence that the prohibited commercial speech at issue would be either misleading or potentially misleading, there is no valid rationale for providing the speech with lesser protection than that afforded to noncommercial speech. Under the strict scrutiny to which restrictions on noncommercial speech are normally subjected, the Regulations cannot stand.

## CONCLUSION

The Washington Legal Foundation respectfully requests that the Court reverse the judgment of the court of appeals.

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[13] If speech is only *potentially* misleading, WLF submits that the governmental interest is insufficient to justify prohibition of the speech if other government controls are sufficient to address the government's concern. For example, disclaimers attached to product label will often be sufficient to eliminate the potential that consumers will be misled. Thus, for example, the health warnings mandated by the FCLAA on cigarette labels and advertisements are generally deemed sufficient to ensure that no consumers who buy cigarettes will be misled (by the absence of the warnings) into believing that the products are safe.

Respectfully submitted,

Daniel J. Popeo
Richard A. Samp
(Counsel of Record)
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

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